

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT,  
IN AND FOR ALACHUA COUNTY, FLORIDA

STUDENTS FOR ONLINE VOTING,  
THOMAS F. JARDON (President),  
and SAM A. MIORELLI, (Executive  
Director),

Petitioners,

Case No. 2008 CA 833 W

vs.

Student Government of the Student  
Body of the University of Florida;  
Supreme Court of the Student  
Government of the Student Body of the  
University of Florida; and Bernard  
Machen, as President  
of the University of Florida and Agent of  
the University of Florida Board of  
Trustees.

**PETITIONERS' RESPONSE TO RESPONDENT'S REPLY  
TO PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS**

Respondent's memorandum does not, and can not, establish that this Court lacks original jurisdiction to entertain Petitioners' petition for writ of prohibition and mandamus under the facts of this case. The fact that the District Court of Appeal possesses concurrent original jurisdiction does not somehow deprive this Court of its original jurisdiction. The only real question before this Court at this time is whether, as a matter of judicial *discretion* in light of public policy, this controversy should be adjudicated here, where the relevant facts may be gathered and where all parties are located, or in Tallahassee, where Respondent would prefer.

Respondent essentially refuses to acknowledge the distinction between this Court's original jurisdiction, as granted by the Florida Constitution, and its appellate jurisdiction. A simple hypothetical scenario readily illustrates the importance of the distinction between this Court's original and appellate jurisdiction. If the legislature were to enact a statute providing that, "The Student Body Supreme Court possesses the jurisdiction to adjudicate actions of the student government unconstitutional under the Constitution of the United States." There could be no doubt that this Court would possess the original jurisdiction under Article V § 5 and § 86.011 Fla. Stat. to adjudicate the constitutionality of such a statute, despite the fact that review of the administrative decisions of student government is governed by Chapter 120.

Similarly, if *without legislative authority* the Student Government Supreme Court simply claims jurisdiction "to adjudicate actions of the student government unconstitutional under the Constitution of the United States," which it in fact has done, this Court possesses *original* prohibition jurisdiction to establish that the presumed exercise of jurisdiction is an unconstitutional usurpation of judicial authority in violation of the Florida Constitution, which provides:

Section 1. Courts. – The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. *No other courts may be established by the state, any political subdivision, or any municipality.*

Article V §1 Florida Constitution (italics added).

The Supreme Court examined the question of concurrent jurisdiction in the context of a habeas corpus petition in *Harvard v. Singletary*, 733 So.2d 1020 (Fla. 1999):

Although we have original jurisdiction to issue writs of habeas corpus, prohibition, mandamus, and quo warranto, our jurisdiction is discretionary. See art. V, § 3(b)(7),(8), (9), Fla. Const. Our jurisdiction is also concurrent with the jurisdiction of the district courts of appeal and the circuit courts. See art. V, §§ 4(b)(3), 5(b); see generally *State ex rel. Scaldefferri v. Sandstrom*, 285 So.2d 409, 411 (Fla.1973). For the reasons that follow, we decline to exercise our jurisdiction in this case and elect to transfer the petition to a more appropriate court. By doing so, we are exercising the discretion granted to us by the Florida Constitution.

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As is true of many of these writ petitions, a review of the instant petition suggests that the resolution of this case could very well require fact-finding, a task this Court is ill-equipped to handle. See *State ex rel. Watkins v. Fernandez*, 106 Fla. 779, 788, 143 So. 638, 641 (1932). Clearly, such cases should be handled by the circuit courts because they often concern issues specifically related to matters occurring in the circuit and the circuit court would be in the best position to quickly and efficiently resolve such problems.

*Id.*, 733 So. 2d at 1021, 1022.

In *State ex rel. Scaldefferri v. Sandstrom*, 285 So.2d 409 (Fla. 1973), another habeas corpus case, the Supreme Court explained why a petition for extraordinary writ may be brought in any court of *original* jurisdiction, irrespective of appellate review jurisdiction, when a constitutional issue such as involved here is raised. First, the Supreme Court explained why that court or a district court might exercise its *original* jurisdiction, despite the fact that a circuit court also possessed *original* jurisdiction:

We of course have concurrent jurisdiction in habeas corpus with the district and circuit courts. This does not mean, however, that a petitioner has three direct, repetitious applications available to him, one to each of these courts in sequence upon the same subject matter. However, relief through habeas corpus cannot be denied a petitioner in the district court or in the Supreme Court, should the trial court for some reason refuse to hear or should frustrate the petitioner upon his petition in habeas corpus, for he is constitutionally guaranteed this basic right. *Id.*, at 285 So.2d at 411. Then, the Court explained why the circuit court possessed *original* jurisdiction to issue an extraordinary writ despite the fact that it had no direct review authority over the decisions of the agency to which the writ issued:

There is jurisdiction in our circuit courts to act in habeas corpus regarding bail, *without regard to their appellate authority to review orders of the court whose earlier order on bail is brought into question.* ... This basic habeas corpus review is essential to insure constitutional guarantees of liberty (Fla.Const. Art. I, s 2-Basic Rights), and right to bail (Art. I, s 14). *Id.*, at 285 So.2d at 412. (Italics added.) This case is governed by exactly the same principles.

The cases cited by Respondent are readily distinguishable. *Florida Dept. of Community Affairs v. Escambia County*, 582 So.2d 1237(Fla. 1<sup>st</sup> DCA 1991), involved an attempt of a litigant before the Administrative Commission to obtain review of discovery matters in circuit court by prohibition, despite the fact that only the district court possessed jurisdiction to undertake appellate review of the Commission's decisions. A writ for petition of prohibition against the circuit court was filed in the district court, which ruled:

Because ultimate review of the final order of the Administrative Commission is in this court, an extraordinary petition to review a nonfinal order or to challenge the jurisdiction of the agency or DOAH is properly filed in this court, not the Circuit Court. We make no determination regarding the merits of the petitions filed in the Circuit Court, we find only that jurisdiction is properly in this court. Accordingly, the petition for writ of prohibition is granted. *Id.*, 582 So.2d at 1239. Plainly, *Escambia County* involved no attempt by the Administrative Commission to usurp the powers of a court in violation of Article V §1, as involved here. Instead, that case involved only review of garden variety discovery issues which were directly reviewable in the administrative proceedings. *Escambia County* has not relevance to the issue in this case.

*Department of Health, Bd. of Dentistry v. Barr*, 882 So.2d 501 (Fla. 1<sup>st</sup> DCA 2004) involved a similar ordinary litigation issue that arose in proceedings before the Board of Dentistry. A litigant sought to review the administrative proceedings by petition for writ of

prohibition in the circuit court. The opponent filed a petition for writ against the circuit court in the district court, which applied the ruling in *Escambia County* to hold:

In the instant case, respondent filed a petition for writ of prohibition in the circuit court, seeking a determination under section 456.073(2), Florida Statutes, *that the Department's failure to adhere to the time limitations materially impaired the fairness and correctness of the administrative proceedings*. As this court held in *Escambia County*, this court has appellate review over the instant subject matter. Therefore, the circuit court lacks jurisdiction to grant respondent's petition.

Accordingly, the petition for writ of prohibition is granted. *Id.*, 882 So.2d at 501. (Italics added.) As in *Escambia County*, *Barr* involved no attempt of an administrative body to usurp the judicial powers of the state in violation of Article V §1 of the Florida Constitution. Instead, it involved only an attempt to obtain appellate review of an administrative action in circuit court rather than in the district court where appellate review properly lay. *Barr* thus provides no support for Machen's submission.

*State ex rel. Florida Real Estate Commission v. Anderson*, 164 So.2d 265 (Fla. 2nd DCA 1964), was commenced as a disciplinary proceeding against certain respondents before the Real Estate Commission. Respondents filed a petition for prohibition in circuit court alleging that the Commission had already punished them for same acts and could not do so again. Again, no claim was made that the Commission was attempting to usurp the judicial powers of the state in violation of the constitution. In response, the Commission filed a petition for writ of prohibition against the circuit in district court, which held:

The jurisdiction of a circuit court to issue writs of prohibition and all writs necessary or proper to the complete exercise of its jurisdiction is necessarily limited to the

issuance of such writs in proceedings involving a subject matter over which it has *original* or appellate jurisdiction. *The circuit court does not have jurisdiction to entertain prohibition proceedings initiated to prohibit an agency of the state from exercising its lawfully delegated judicial powers*, where the circuit court does not have appellate jurisdiction over such agency. *Id.*, 164 So.2d at 268 (italics added). The italicized sentence is dispositive of this case, i.e., the circuit court has no prohibition jurisdiction “to prohibit an agency of the state from *exercising its lawfully delegated judicial powers.*” (italics added). Here, the challenge is to the *unlawful usurpation of judicial powers* that the respondent does not and cannot possess. This Court plainly possesses *original* jurisdiction over such a claim. In short, this case raises the very unconstitutional usurpation issue that was not present in *Anderson*.

*State ex rel Bettendorf v. Martin County Environmental*, 564 So.2d 1227 (Fla. 4<sup>th</sup> DCA 1990) started as an administrative proceeding against Petitioners in the Martin County Environmental Board. Statutory direct review of the Board’s decision lay in the circuit court. Despite that, Petitioners filed a petition for writ of prohibition in the district court alleging that the environmental board had no jurisdiction because action was commenced out of time. Again, no claim was made that the board was attempting to usurp the judicial power of the state in violation of the constitution. The District Court explicitly noted that it had no *appellate* jurisdiction to review the matter because statutory review was in the circuit court. The District Court also explicitly stated: “There is no contention, nor can there be, that the district court has original jurisdiction in this case.” *Id.*, 564 So. 2d at 1228, n. 1. Plainly, *Bettendorf* has no relevance to this proper *original jurisdiction* case.

*State ex rel. Gerstein v. Schulz*, 180 So.2d 367 (Fla. 3<sup>rd</sup> DCA 1965) is another of the numerous habeas corpus cases that demonstrate why this Court *does possess original jurisdiction in this case*. There the district court explained:

In certain prior decisions it has been duly noted that the constitutional grant of power to the circuit court to issue writs, such as habeas corpus, prohibition and mandamus, does not authorize their use as a means of exercising appellate jurisdiction or supervisory control over courts or causes as to which the circuit court lacks appellate jurisdiction.

Without receding or detracting from the effect of those decisions, we hold that in acting in habeas corpus to reduce bail which has been set by a trial court *before trial*, the circuit court is not acting in excess of its jurisdiction. Such action by the circuit court is a proper exercise of its jurisdiction in habeas corpus to restore liberty (on bail which is not excessive) to an accused who otherwise would be illegally confined.

*Id.*, 180 So.2d at 368, 9. Again, where usurpation or overt violation of constitutional principles is involved, any court with *original* jurisdiction may intervene.

The entire substance of the opinion in *Dupont v. Hershey*, 576 So.2d 442 (Fla. 4<sup>th</sup> DCA 1991) states: This petition for writ of prohibition is dismissed for lack of jurisdiction. The petition requests this court to prohibit the county court from exercising jurisdiction in appellant's criminal trial. Extraordinary writ jurisdiction follows appellate jurisdiction. Since the circuit court has jurisdiction of appeals from the county court, a writ of prohibition against the county court must be addressed to the circuit court.

*Dupont v. Hershey*, 576 So.2d 442, 443 (Fla. 4<sup>th</sup> DCA 1991)(citations omitted).

Although it is impossible to know the precise facts from this brief opinion, it is plain that *Dupont* is not a case in which a non-judicial entity was usurping the judicial powers of the state in violation of Article V §1 Florida Constitution. *Dupont*, thus, has no relevance to this case.

*Newkirk v. Jenne*, 754 So.2d 61 (Fla. 4<sup>th</sup> DCA 2000) is another decision acknowledging when a circuit court possesses original extraordinary writ jurisdiction over an agency whose ordinary decisions are reviewable elsewhere.

Both Article V, section 5(b) of the Florida Constitution and section 79.01, Florida Statutes, provide that a circuit court has concurrent jurisdiction with the district courts of appeal and the state supreme court to grant a writ of habeas corpus. See also *State ex rel. Scaldeferri v. Sandstrom*, 285 So.2d 409, 412 (Fla.1973). The only limitation on the circuit court's jurisdiction is that such court is:

not empowered generally to review by habeas corpus the orders of courts over which the circuit court does not have appellate jurisdiction, particularly as to the legal sufficiency of the order sought to be reviewed, although the circuit court may entertain such a proceeding and discharge a petitioner held under an *illegal or void order*.

*Id.*, at 754 So. 2d at 61 (italics added.). Again, *Newkirk* acknowledges that this Court possesses *original* extraordinary writ jurisdiction to interdict bald usurpations of power that violate the constitution.

*State ex rel. Renaldi v. Sandstrom*, 276 So.2d 109 (Fla. DCA 1973) acknowledged the same principle, saying:

'It is clear therefore that the circuit court has the jurisdiction to entertain the writ for the purposes of inquiring into the legality of the detention in accordance with the criteria set forth in the above cited cases. *Moreover, the circuit court has jurisdiction in habeas corpus to grant bail 'without regard to whether the circuit court so acting has appellate jurisdiction of the court involved.'*

*Id.*, 276 So.2d at 109,110 (quoting from *State v. Schulz*, 180 So.2d 367 (Fla. 3d DCA 1965)(italics added).

Finally, *School Bd. of Osceola County v. UCP of Cent. Florida*, 905 So.2d 909 (Fla. 5<sup>th</sup> DCA 2005), is not a prohibition case, and provides no authority to defeat the original prohibition jurisdiction of this Court in the case. The *UCP* issue was whether direct review of an administrative decision lay in the district court or in the circuit court when the

legislature had not designated which court had jurisdiction to review the question.

Although Article V Florida Constitution permits the legislature to place jurisdiction to review administrative decisions in either circuit or district courts, the legislature had failed to make such a designation in the legislation in question. Hence, the issue before the district court was one of statutory construction. Because the issue was one of state wide significance, not merely a local concern, the district court concluded:

The preceding analysis leads us to the conclusion that the district courts and not the circuit courts have jurisdiction to review the final decisions described in section 1002.33(6)(d), Florida Statutes (2003).  
*Id.* at 912. *UCP* is thus a case of statutory construction and provides no authority relating to the issue before this Court.

Although the issue of which court should exercise jurisdiction when jurisdiction has been concurrently claimed in courts of concurrent jurisdiction is not at issue here (the First District Court of Appeal has stayed the case filed there), the settled law is that jurisdiction should remain in the first court. *Coon v. Abner*, 246 So.2d 627(Fla. 4<sup>th</sup> DCA 1971), explained:

The general rule relating to priority in courts of concurrent jurisdiction is well stated in 8 Fla.Jur., Courts, s 121, p. 398, as follows:

'Where two courts have concurrent jurisdiction in any proceeding, The power to entertain the action attaches exclusively to that court which first exercises jurisdiction in the matter. And that court will ordinarily retain such jurisdiction for the purpose of deciding every issue or question properly arising in the case. In fact, when a court of concurrent jurisdiction acquires it before any other court, its jurisdiction then becomes exclusive, and prohibition will lie to restrain interference therewith. This has been the rule since territorial times, the courts reasoning that the tribunal which first acquires jurisdiction

should be permitted to retain it To the termination of the cause.’  
(Emphasis supplied.)

*Id.*, 246 So.2d at 628.

Similarly, *Hogan v. Millican*, 209 So.2d 716 (Fla. 1<sup>st</sup> DCA 1968), stated:

With respect to priority of courts with concurrent jurisdiction, the settled law of this state appears to be as follows:

Where two courts have concurrent jurisdiction in any proceeding, the power to entertain the action attaches exclusively to that court which first exercises jurisdiction in the matter. And that court will ordinarily retain such jurisdiction for the purpose of deciding every issue or question properly arising in the case. In fact, when a court of concurrent jurisdiction acquires it before any other court, its jurisdiction then becomes exclusive, and prohibition will lie to restrain interference therewith.

*Id.*, 246 So.2d at 718.

Finally, in *Ullendorff v. Brown*, 24 So.2d 37 (Fla. 1945) the Supreme Court stated:

We are of the view that a court which might otherwise have jurisdiction of a cause may be restrained by prohibition from interfering with an exclusive jurisdiction acquired by another court of concurrent jurisdiction by reason of the latter court being the court first to assume and exercise jurisdiction in the particular case.

*Id.*, 24 So.2d at 39. These decisions thus provide authority for the proposition that this action should be litigated in this court.

## **CERTIFICATE OF SERVICE**

I certify that a copy of this document was hand-delivered or delivered by facsimile to Sonya Rudenstine, Esq., counsel for Respondent, Tigert Hall, Gainesville, Fl. on this 23rd day of April 2008.

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